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CASE NUMBER _____

IN THE

United States Supreme Court

OCTOBER 1983 TERM

ABBOT BUDD KAUFER MEDINA, *et. al.*

Plaintiffs - Respondents

v.

DAVID CASTAÑON PEREZ, *et. al.*

AMERICAN INTERNATIONAL INSURANCE COMPANY OF PUERTO RICO, *et. al.*

Defendants - Petitioners

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI

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Comes now the defendants through their undersigned attorneys and respectfully petitions this Honorable Court for Certiorari in order to review a decision issued by the Honorable United States Court of Appeals for the First Circuit.

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THE QUESTION PRESENTED FOR REVIEW

The issue in this case involves the jurisdiction of federal courts under admiralty when a sixteen foot pleasure boat allegedly struck two swimmers near the sandy area of a public beach. The U.S. District Court determined that although the boat was in navigable waters, following this Court's opinion in ***Foremost Insurance Company v. Richardson,*** 457 U.S. 668 (1982) there was no jurisdiction because such incident did not bear a significant relationship to traditional maritime activities. The United States Court of Appeals for the First Circuit reversed through a judgment entered on May 2, 1984. Petition for rehearing was denied on June 6, 1984.

The question presented for review is whether an accident occuring in a public beach involving a collision between a pleasure boat and two swimmers, and which involves no traditional maritime activity other than the use of navigable waters, is sufficient to sustain admiralty jurisdiction.

Petitioner herein claims there is no admiralty jurisdiction under ***Foremost*** since the accident had no impact or "substantial effect" on maritime commerce, and there occurred no

"disruptive impact" on navigation. The accident was strictly of a local nature and the swimmers were immediately pulled out of the water and given medical attention.

The alleged basis for federal jurisdiction is 28 USCA 1333 through which the District Courts have original jurisdiction of any civil case of admiralty or maritime jurisdiction, as interpreted and limited by this Honorable Supreme Court in the cases of ***Executive Jet Aviation, Inc. v. City of Cleveland,*** 409 U.S. 249 (1972) and the case of ***Foremost.***

OPINIONS DELIVERED BY THE COURTS BELOW

Appended to this petition in accordance with Rule 21.1 (k) are the opinions of the Honorable District Court for the District of Puerto Rico dated November 15, 1983 in which federal jurisdiction was denied and of the Honorable United States Court of Appeals, for the First Circuit, dated May 2, 1984 which reversed the District Court's opinion.

Also in the appendix we included the Order of the Court denying our petition for rehearing dated June 6, 1984.

JURISDICTION OF THIS COURT

The judgment sought to be reviewed was entered by the United States Court of Appeals for the First Circuit on May 2, 1984. Rehearing was denied on June 6, 1984.

Jurisdiction of this Honorable Court is claimed under 28 USCA § 1254 (1) and under Rules 17 and 20 of the Supreme Court.

STATUTE INVOLVED IN THE CASE

The statute involved in this case is 28 USCA § 1333 which reads:

> § 1333 Admiralty, maritime and prize cases
>
> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled,
>
> (2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize. June 23, 1948, c. 646 Stat. 931; May 24, 1946, c. 139, § 79, 63 Stat. 101.

The controversy before this Court is whether the First Circuit Court of Appeals failed to follow this Court's opinion in the cases of ***Foremost Insurance Company v. Richardson,*** 457 U.S. 668 (1982) and ***Executive Jet Aviation Inc. v. City of Cleveland,*** 409 U.S. 249 (1972), by holding that maritime jurisdiction attaches to any accident that occurs in navigable waters.

STATEMENT OF FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTION PRESENTED

The accident involves a sixteen foot pleasure boat which allegedly struck two swimmers in navigable waters near the sandy area of a public beach. Both were swimming in about six feet of water.

This public beach is on the shores of the Atlantic Ocean and is frequented, especially on Sundays, by many swimmers and on occassions by some small pleasure boats. As soon as the accident occurred, the swimmers were pulled out of the water and given immediate medical attention. It is alleged that the boat causing the accident was driving at a high speed at the moment of the accident and continued on its course without stopping nor rendering assistance to the two swimmers.

The District Court determined that the waters where the accident occurred were navigable waters, although this fact was disputed by petitioners herein who claim that the reefs surrounding the public beach make it impossible or impractical for commercial navigation.

ARGUMENTS AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

We have three reasons to believe that the writ of Certiorari should be granted in our case. First, the First Circuit Court of Appeals has decided a Federal question so as to be in direct conflict with applicable decisions of this Court. Secondly, said Court of Appeals rendered a decision in conflict with the decision of another Court of Appeals on the same matter. Thirdly, the First Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be clarified and settled by this Court.

I

THE FIRST CIRCUIT COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN DIRECT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The Supreme Court of the United States granted certiorari in the case of ***Foremost*** not only to determine whether the collision of two pleasure boats on navigable waters falls within the admiralty jurisdiction of the federal courts, but also to resolve the confusion in the lower courts respecting the impact of ***Executive Jet*** on traditional rules for determining federal admiralty jurisdiction. ***Foremost*** decided that an accident between two pleasure vessels at the entrance of an important navigable river had sufficient relationship to traditional maritime activity so as to fall within federal admiralty jurisdiction because such accident could affect the navigation of other commercial vessels that used the waterway.

The rationale of the Supreme Court in ***Foremost*** is contained in the following sentence taken from said case:

> . . .the potential disruptive impact of a collision between boats on navigable

> waters, when coupled with the traditional concern that admiralty law holds for navigation, compels the conclusion that this collision between two pleasure boats on navigable waters has a significant relationship with maritime commerce. (457 U.S. 668, 675)

Prior to the above sentence, and leading the theory of the majority opinion the Court said:

> . . .for example, if these two boats collided at the mouth of the St. Lawrence Seaway, there would be a substantial effect on maritime commerce, without regard to whether either boat was actively, or had been previously, engaged in commercial activity. (457 US 668, 675)

We understand the opinion of the Court in ***Foremost*** to expand admiralty jurisdiction to include boating accidents occuring on navigable waters when such accidents have or could have a disruptive impact on traditional maritime commerce. The example used by the court is clear. Two pleasure boats which collide in navigable waters could present a hazard to

navigation until the obstacle is removed.

In the present case, the Court of Appeals relies on another sentence from the ***Foremost*** decision which says:

> . . .because the "wrong" here involves the negligent operation of vessel on navigable waters, we believe that it has a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction in the District Court. (457 US 668, 674)

The Supreme Court seems to be saying that the negligent operation "per se" of any vessel (even a rowboat) on navigable waters is sufficient to confer admiralty jurisdiction on federal courts. For this reason the First Circuit Court of Appeals reversed the District Court and granted federal jurisdiction.

We respectfully suggest that if the published Appeals Court opinion in this case is allowed to stand, then every conceivable accident involving any pleasure craft (rowboats, canoes, wind surfers) that are used negligently in navigable waters will have a sustainable federal maritime case regardless of the strictly local nature of the accident. Had this been the intention of the Supreme Court in

Foremost it would have said so. It is relevant to note that after said sentence regarding "the negligent operation of a vessel on navigable waters" the *Foremost* opinion went on to give the example of the two boats colliding at the mouth of the St. Lawrence Seaway and the substantial effect on maritime commerce such a collision would have. It also used adjectives such as "potential" and "disruptive" to describe the impact of a collision between two boats on navigable waters. It then went on to quote the rule of "significant relationship with maritime commerce" which has been cited extensively in every similar case regarding admiralty jurisdiction since *Executive Jet.*

We understand that there may be a "significant relationship with maritime commerce" when two boats collide at the mouth of a port, but not when a pleasure boat strikes a swimmer a few feet from the shore.

Unless a pleasure boat is anchored on navigable waters, it must be navigating on such waters. Contrary to *Foremost,* the Court of Appeal decided that *every* accident inolving *any* pleasure craft while going from one place to the other (navigating) in *any* navigable stream or water body would fall under the jurisdiction of admiralty courts. If the decision in this case is allowed to stand the worst fears of the dis-

senting Justices in ***Foremost*** (Chief Justice Burger, Justice O'Connor, Justice Powell and Justice Rehnquist) would be justified. The operators of canoes, rowboats, sailboats, motor boats and perhaps even surfboards, 1, that were involved in accidents could be sued in federal courts under admiralty jurisdiction; the sole factor under the First Circuit decision is that the craft be operating in a navigable stream.

One sentence in the opinion of the Court of Appeals summarizes the prevailing attitude of said court in granting jurisdiction. It said:

> The actor in this case was a vessel, and that is enough.
> (Appendix, page 14)

That Appellate Court statment is directly contrary to the holding of this court in ***Foremost*** and ***Executive Jet.*** Two strict doctrines were struck down in both cases. The "strict locality rule" was abolished in ***Executive Jet*** and the "strict commercial rule" was discontinued in ***Foremost.*** Both strict rules had been used as

1. A pre-Executive Jet decision upheld federal jurisdiction under admiralty in a surfboard accident. ***Davis v. City of Jacksonville,*** 1965, 251 F. Supp. 327.

the basis for establishing federal jurisdiction in admiralty cases for decades and these two leading cases came to discontinue both rules.

The strict locality rule said that there was federal jurisdiction in admiralty in ***any*** tort occuring on navigable waters. The ***Executive Jet*** decision abolished such "strict locality rule" by citing well established early maritime case law; (Victoria Carriers, Inc. v. Law, (1813) 404 US 202, 205, 40 LMD 2d 383, 92 Ct 418).

It is now also well established that the strict locality rule was struck down by this court in ***Executive Jet.*** However, the First Circuit Court of Apeals contrary to ***Executive Jet,*** has reverted to the use of the strict locality rule. Thus, ***any*** negligent operation of ***any*** pleasure craft on navigable waters will be allowed admiralty jurisdiction. This is now the law of the First Circuit, unless this court rules otherwise.

As long as there is navigation and negligence, jurisdiction will be granted! The old strict locality rule cited in ***Executive Jet,*** stated:

> . . .if the wrong occurred on navigable waters, the action is within admiralty jurisdiction; if the wrong occurred on land, it is not.
> (409 US 249, 253)

This rule was expressly revoked in ***Executive Jet.*** The Court of Appeals decided this important federal question in a way which is in direct conflict with the mandate of ***Foremost*** and ***Executive Jet.***

II
THE COURT OF APPEALS HAS RENDERED A DECISION IN CONFLICT WITH THE DECISION OF ANOTHER COURT OF APPEALS ON THE SAME MATTER.

Contradictory opinions from the circuit courts exist to this day regarding pleasure boating accidents and federal jurisdiction. The Court of Appeals in our case voices such contradictions and cites the case of ***Crosson v. Vance,*** of the 4th. Circuit, 1973, 484 F. 2nd 840, which held that admiralty jurisdiction did not extend to a suit by a water skier who was struck by a motor boat. On the other hand, there exists the case of ***Richards v. Blake Building Supply, Inc.,*** also in the 4th Circuit, 1975, 528 F. 2nd 745, which held that jurisdiction did exist in a suit by a pleasure boat passenger injured from an explosion aboard such vessel, and in another case involving a collision with a river bank. The ***Crosson*** decision should have been the leading

case since it involved a swimmer struck by a boat; whereas ***Richards*** involved explosions on a boat and a collision with a river bank. Thus, the First Circuit decision in this case also directly contradicts the Fourt Circuit decision as regards an injured swimmer and a passing boat.

This court, in ***Executive Jet,*** 409 US 249, Page 256, cited injured swimmer cases criticizing their "mechanical application" of the strict locality rule "in sustaining admiralty jurisdiction". The Court cited in its criticism the cases of ***King v. Testerman,*** 214 F. Supp. 335, 1963; and ***Davis v. City of Jacksonville Beach,*** 251 F. Supp. 327, 1965, among others. Both of these cases involved negligent craft navigation and swimmers. The ***Executive Jet*** court not only criticized them, but also uses such criticism as a basis and argument revoking the application of the strict locality rule, and denying federal maritime jurisdiction.

Facing such conflicting opinions by circuit courts vis a vis the rationale of ***Executive Jet*** in its injured swimmer cases and absence of jurisdiction, the District Court of Puerto Rico carefully analyzed the rest of admiralty tort jurisdiction used throughout the years up to and including ***Foremost.*** The District Court scholarly elaborated the extent of ***Foremost's***

"potential disruptive impact" sentence in order to reach its conclusion. In order to do so, the District Court defined "navigable waters";1 It dealt with "traditional maritime activities";2 It also entered into the collision between vessels in navigation and submerged hulks of wrecked vessels as traditional concern of admiralty;3 Finally, the District Court took into consideration the issue of injured swimmers4 and injured water skiers.5

In following the opinion of ***Crosson v. Vance,*** supra, the District Court also refused to exercise jurisdiction over a tort involving an injured swimmer. The First Circuit Court, however, in support of its clearly conflicting decision in this case, cited ***Richards v. Blake Building Supply, Inc.,*** (4th Cir, 1975, 528 F 2nd 745) a decision of the same Fourth Circuit which involved a different set of facts (explosion and collision but no swimmers) and legal issues.

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1. ***United States v. Stoeco Homes,*** Inc. 498F 2nd 597, (3d Cir. 1974, Cert. denied, 420 US 927 1975)
2. ***Foremost*** and ***Executive Jet***
3. ***Lane v. United States,*** 529 F 2nd 175, 4th Cir. 1975.
4. ***Davis v. City of Jacksonville Beach, Florida,*** 251 F. Supp. 327, 1965.
5. ***King v. Testerman,*** 214 F. Supp. 335, 1963
   Crosson v. Vance, 484 F. 2nd 840, 4th Cir. 1973
   Jorsch v. LeBeau, 449 F. Supp. 485, 1978.
   Webster v. Roberts, 417 F. Supp. 346, 1976.

This Honorable Court should settle the conflict between the two Circuits. If the District Court was wrong, as indicated by the opinion of the Court of Appeals, it seems several other District Courts have also been wrong in the interpretation of this issue as we shall see in the discussion of our next topic.

III

AN IMPORTANT QUESTION OF FEDERAL LAW HAS NOT BEEN CLEARLY SETTLED

From 1963 until the ***Executive Jet*** decision of 1972 several cases involving swimmers were decided in favor of jurisdiction under admiralty law. These were the cases of ***King. v. Testerman,*** 1963, 214 F. Supp. 335; ***Davis v. City of Jacksonville, Florida,*** 1965, 251 F. Supp. 327; and ***Green v. Ross,*** 1972, 338 F. Supp. 365.

As we stated above, these cases were critized by the ***Executive Jet*** court when it considered that jurisdiction was being allowed by the District Courts under the "strict locality rule" which it proceeded to revoke. Not only did ***Executive Jet*** disapprove decisions sustaining admiralty jurisdiction over claims involving swimmers, but it also upheld decisions which required some connection with traditional maritime activity. (***Executive Jet,*** 409 US 249 at. 256-257).

The logical conclusion to be reached in such approval and disapproval by the Supreme Court in water skier and surfboard accidents in shallow waters, is that such cases should no longer be tried in Federal Courts under admiralty jurisdiction. For this reason in 1976 a water skier case was dismissed for

lack of jurisdiction in the Fourth Circuit (***Crosson v. Vance,*** 484 F 2nd. 840).

In 1976 in the case of ***Webster v. Roberts,*** (417 F. Supp. 346) a Federal District Court applied the case of ***Crosson*** cited previously and dismissed jurisdiction in another water skier case.

In 1974, the Eighth Circuit issued the ***St. Hilare Moye v. Henderson*** decision (494 F. Supp. 973) which complicated matters. It found jurisdiction over a boating accident involving a small pleasure craft. This case is the basis for respondent's brief in our case before the First Circuit. However, in 1978, a District Court in the case of ***Jorsch v. LeBeau,*** (449 F. Supp. 485) dealt with a water skier who was injured by a boat and expressly rejected the ***St. Hilare Moye*** case cited above (decided by the Eighth Circuit) and instead applied the doctrine of the Fourth Circuit in 1973 by ***Crosson v. Vance.***

To complicate matters even further, the ***St. Hilare Moye*** court itself, although deciding in favor of jurisdiction in a pleasure boat accident, recognized elsewhere in the opinion that a case involving a personal injury claim by a water skier has "no connection with traditional maritime activity". ***St. Hilare Moye, supra,*** at 977. In fact, that Court cited the

Fourth Circuit Court decision of ***Crosson v. Vance.***

The case of ***Otto v. Alper***, (1980) 489 F. Supp. 953, although involving a collision between a sailboat and a motor boat which took place on navigable waters, seems to lean towards the theory that pleasure boating accidents do fall within the admiralty jurisdiction. (This was prior to the 1972 ***Foremost*** decision).

On the other hand, and after ***Foremost*** in 1983, in ***Francois v. Raybestos-Manhattan, Inc.,*** 577 F. Supp. 434, a Federal District Court in North Dakota decided that:

> The clear implication of ***Foremost Insurance*** is that any party asserting admiralty jurisdiction must be prepared to demostrate a significant connection with a traditional maritime activity.

This decision quotes the First Circuit opinion in the case of ***Austin v. Unarco Industries, Inc.,*** 1983, 705 F. 2nd 1, which emphasizes that the Supreme Court rejected the "traditional strict locality" test for admiralty tort jurisdiction in ***Executive Jet*** and required also "that the wrong bear a significant relationship to traditional maritime activity". The

Austin court repeats that the "only issue, therefore, is whether the wrong bears a significant relationship to traditional maritime activity". (*Austin v. Unarco Industries, Inc.*, 705 F. 2nd 1, at page 9).

It is evident that the same rules established in *Executive Jet* are being used by Court of Appeals as well as District Courts to rule in favor or against jurisdiction in injured swimmers cases and other admiralty jurisdiction situations.

Since *Executive Jet* critized jurisdiction in injured swimmers cases, but *Foremost* spoke about the negligent operation of a vessel on navigable waters, courts everywhere have no clear guidance from this Court in deciding to grant or deny jurisdiction in an injured swimmer situation. They may quote from the *Foremost* decision in finding that in an injured swimmer situation there is "no potential disruptive impact" to commercial navigation and thus deny jurisdiction. On the other hand, a Court could find that the wrong involves the negligent operation of a vessel (also cited in *Foremost)* and allow jurisdiction. Such an important question should be settled by this Honorable Court.

CONCLUSION

Black's Law Dictionary defines the term "navigate" in the following manner:

> To journey by water; to go in a vessel; to use the waters as a highway for commerce or communication; to ply, to direct one's course through any medium; to steer, especially to operate an airplane or airship. ***United States v. Monstad,*** C.C.A. Cal, 134 F. 2d 986, 987, 988.

Under this definition small boats and other pleasure crafts go from one place to the other by navigating. We disagree that the ***Foremost*** decision held that any accident involving any pleasure craft occurring as a consequence of the negligent operation of the same would be sufficient to establish jurisdiction under admiralty law. This was never the intention of ***Foremost.*** We sustain that something more than negligent navigation by a pleasure craft as the cause of an accident is needed under ***Foremost*** in order to obtain federal jurisdiction.

The United States has the Atlantic Ocean on the East, the Caribbean Sea and Gulf of Mexico on the South, the Pacific Ocean on the West

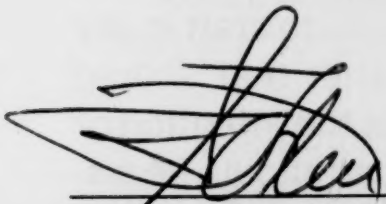
and many navigable rivers, lakes, streams and dams. Allowing federal maritime jurisdiction for every conceivable accident involving the negligent operation of any pleasure craft in ***any*** navigable water-body is a matter that should concern this Court. If such was the intention of this Court in ***Foremost,*** the matter should be clearly established to avoid continued conflict between the circuits and the various district courts.

For the reasons aforestated this Court should grant Certiorari to reverse the decision of the First Circuit Court of Appeals in this cases.

Respectfully submitted on this 27 day of August, 1984.

CERTIFICATE OF SERVICE: The undersigned attorneys being members of the Bar of this Honorable Court do hereby certify pursuant to Rule 28.5 of the Supreme Court Rules that three copies of this Petition for Certiorari were served and notified to the attorney for the Plaintiffs and Respondents, Edelmiro Salas García, at his address of record, Penthouse Esquire Building, Ponce de León Avenue corner Vela Street, Hato Rey, Puerto Rico 00918, by deposit on this date of said three copies in a United States Post Office,

certified mail, first class postage prepaid, return receipt requested.



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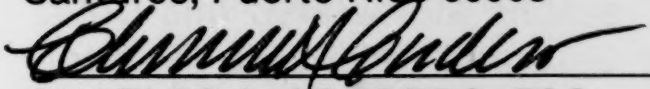

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FOR THE DEFENDANTS-PETITIONERS:

David Castañón Pérez
Ana María Caballín de Castañón
The Conjugal Partnership between David Castañón
Pérez and Ana María Caballín de Castañón
John Doe and Richard Roe
American International Insurance Company of Puerto Rico
One motor manufactured by Glastrom, Model 1982,
with 140 H.P. Evinrude engine, her tackle,

trailer, apparel and equipment, registered under licence no. 1292 L with the Puerto Rico Ports Authority under the name of Defendant David Castañón Pérez.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

ABBOT BUDD KAUFER MEDINA, *et al*

Plaintiffs

VS.

DAVID CASTAÑON PEREZ, *et al*

Defendants

CIVIL NO. 82-2504

OPINION AND ORDER

This is an action seeking damages arising out of a boating accident. According to the complaint, on August 8, 1982 plaintiff Abbot Budd Kaufer Medina was swimming in Isla Verde public beach approximately 120-125 feet from the shore when he was struck by a pleasure motor boat operated by defendant David Castañón Pérez. As a result of the accident, Kaufer Medina sustained severe injuries. Plaintiffs then commmenced an action in the Superior Court of Puerto Rico, Carolina Part and thereafter, they also filed the present action in this court. Jurisdiction is pleaded under 28 U.S.C. Section 1333(1).[1] Defendants have filed a mo-

1. Section 1333 Admiralty, maritime and prize cases.
The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

tion to dismiss for lack of admiralty jurisdiction and/or motion to stay.[2]

This court's jurisdiction over the instant case depends on whether the law of admiralty extends to accidents involving small pleasure crafts engaged in non-commercial navigation and swimmers in tidal or navigable waters.

The test of admiralty tort jurisdiction is two-pronged. First, in cases of non-tidal waters (e.g. lakes, rivers, etc.) the alleged wrong must occur in navigable waters; in cases of tidal waters, the test of admiralty jurisdiction is the ebb and flow of the tide. ***United States v. Stoeco Homes, Inc.,*** 498 F. 2d 597 (3rd Cir. 1974), cert. denied, 420 U.S. 927 (1975). Second, the wrong must bear a significant relationship to traditional maritime activity. ***Richardson v. Foremost Insurance Co.,*** 457 U.S. 668 (1982); ***Executive Jet Aviation, Inc., v. City of Cleveland,*** 409 U.S. 249 (1972).

At the outset, we conclude that the first part of the jurisdictional test is satisfied; the accident occurring in a public beach 120-125 feet from the shore.

We turn now to the second requirement and what constitutes traditional maritime acti-

2. Due to our disposition of the jurisdictional question, we do not reach the arguments supporting the request for stay of proceedings.

vity. In ***Executive Jet, supra,*** at 270, a unanimous Supreme Court stated that admiralty was concerned with matters such as maritime liens, limitation of liability, cargo damage, and claims for salvage. Nevertheless, a divided Court in ***Foremost*** held that "because the wrong /t/here involve/d/ the negligent operation of a vessel on navigable waters, /there was/ a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction". ***Richardson v. Foremost Insurance Co.,*** 457 U.S. At 674.

On first impression it would seem that ***Foremost*** supports a finding of federal jurisdiction. But the statement of the Court must be analized within the factual context of that case where two pleasure boats collided on the Amite River in Louisiana, resulting in the death of one of the occupants. The Court extended admiralty jurisdiction due to the ***"potential disruptive impact of a collision between boats on navigable waters. . .coupled with the traditional concern that admiralty law holds for navigation".*** ***Id.*** at 675. Said holding is consistent with the Court's prior ruling in ***Executive Jet*** where it implicitly recognized admiralty jurisdiction in a ***Foremost*** situation pointing out that when a collision between vessels occurs, the law of admiralty looks to the navigational rules to determine fault, liability, and all other questions that may

arise from such a catastrophe. ***See also Lane v. United States,*** 529 F. 2d 175, 180 (4th Cir. 1975) ("collisions between vessels in navigation and ***submerged hulks of wrecked*** vessels are a traditional concern of admiralty").

Nonetheless, ***Executive Jet*** noted the absurdity of extending admiralty jurisdiction to cases involving injured swimmers and waterskiers. The Court said at 255-56:

> If a swimmer at a public beach is injured by another swimmer or by a submerged object on the bottom, or if a piece of machinery sustains water damages from being dropped into a harbor by a land-based crane, a ***literal application of the locality test*** invokes not only the jurisdiction of the federal courts, but the full panoply of the substantive admiralty law as well. In cases ***such*** as ***these,*** some courts have adhered to a ***mechanical application*** of the ***strict locality rule and*** have sustained admiralty jurisdiction despite the lack of any connection between the wrong and traditional forms of maritime commerce and navigation.

This statement was documented in a footnote to a case involving an injury to a swimmer struck by a surfboard, ***Davis v. City of Jackson-***

ville Beach, Florida, 251 F. Supp. 327 (M.D. Fla. 1965), and another case involving an injury to a water skier; *King v. Testerman,* 214 F. Supp. 335 (E.D. Tenn. 1963). In subsequent cases involving water skiers struck by pleasure crafts various courts have held that the tort involved was not significantly related to traditional maritime activity. *Crosson v. Vance,* 484 F. 2d 840 (4th Cir. 1973); *Jorsch v. LeBeau,* 449 F. Supp. 485 (N.D. Ill. 1978); *Webster v. Roberts,* 417 F. Supp. 346 (E.D. Tenn. 1976). We fail to perceive any principled distinction between an accident involving a water skier struck by a boat and a swimmer so injured.[3] Therefore, *Executive Jet's* explicit disapproval of the exercise of admiralty jurisdiction in cases of injured swimmers or water skiers, and its progeny, control our decision today in the case at bar.

Foremost did not overrule *Executive Jet,* nor do we believe it intended to diminish its precedential value regarding injured swimmers ca-

3. In *Jorsch v. LeBeau,* 449 F. Supp. 485 (N.D. Ill. 1978), the accident occurred after the plaintiff had completed water skiing and was bodily in the water. The boat struck plaintiff while he was floating. The district court noted the distinction from *Crosson v. Vance, supra,* where the accident occurred while plaintiff was being towed by a motorboat. The district court, nevertheless, found that the difference was "immaterial to its conclusion that it lack/*ed*/ subject matter jurisdiction over /*the*/ cause". *Jorsch v. LeBeau, supra,* at 487, fn. 5.

ses.[4] Had this been a case involving the collision of two boats we would have been compelled to apply ***Foremost*** and exercise jurisdiction. ***See Richards v. Blake Builders Supply, Inc.,*** 528 F. 2d 745 (4th Cir. (1975).[5] However, that is not the situation here. We thus refuse to exercise jurisdiction over a tort involving an injured swimmer.

Clearly such jurisdiction would exceed the purposes of admiralty jurisdiction. In ***Crosson v. Vance, supra,*** at 840 the Court of Appeals for the Fourth Circuit stated that "/t/he admiralty jurisdiction in England and in this country was born of a felt need to protect the domestic shipping industry in its competition with foreign shipping and to provide a uniform body of law for the governance of domestic and foreign shipping, engaged in the movement of commercial vehicles from state to state and to and

4. Even though ***Foremost*** expressly limited ***Executive Jet*** to its particular facts, it also reiterated ***Executive Jet's*** determinations of federal admiralty jurisdiction outside the context of aviation torts. It noted approvingly the specific language of ***Executive Jet*** cited and relied upon in the body of this opinion. ***Foremost, supra,*** at 674, fn. 4.

5. In ***Richards,*** Chief Judge Haynsworth distinguished the position he had taken in ***Crosson*** concluding that the Supreme Court in ***Executive Jet*** had expressly disapproved the extension of admiralty jurisdiction to water skier cases, but that it had not rejected its prior approval of admiralty jurisdiction in cases involving pleasure boats generally. Today we join Chief Judge Haynsworth's position.

from foreign states". ***Foremost*** made clear, however, that the federal interest in protecting maritime commerce could not be adequately served if admiralty jurisdiction is restricted to commercial activity, but as we have established, such language was originally set forth in the context of a collision between two boats. Undoubtedly, there is an eminent ***federal interest in maintaining uniform rules of conduct regarding the collision of boats or ships.*** Such an interest is totally absent in actions involving injured swimmers. In that type of case the paramount interest sought is not to protect maritime commerce but rather to protect the lives of swimmers, water skiers, and bathers in tidal or navigable waters. Unquestionably that is an interest within the realm of state law. "The Federal Government", as stated by Justice Powell dissenting in ***Foremost, supra,*** at 685, "has little or no genuine interest in the resolution of a garden variety tort case".

Additionally, the application of admiralty law to injured-swimmer cases would "impliedly ***/prohibit/*** the exercise of state legislative power in an area in which local legislatures have generally been thought competent". Stolz, ***Pleasure Boating and Admiralty: Erie at Sea,*** 51 Calif. L. Rev. 661, 664 (1963). ***See also,*** Swaim, ***Yes, Virginia, There is an Admi-***

ralty: the Rodrigue Case, 16 Loy. L. Rev. 43, 44 (1969-70) in which it was stated that in admiralty law the term jurisdiction defines both the power of a court to hear and dispose of a certain controversy, and also the power to prescribe rules of decision to be applied by those *courts considering the controversy. This is so because a* court of admiralty sits solely to administer and apply maritime law. To find jurisdiction in this case would constitute an usurpation of state sovereignty, and a displacement of state responsibility which federal courts should avoid. Such an exercise of jurisdiction would not only burden the federal courts but would also frustrate the purposes of state tort law. *Adams v. Montana Power Co.,* 528 F. 2d 437 (9th Cir. 1975). In essence, concerns of federalism further mandate that this action be dismissed for lack of admiralty jurisdiction.

Finally, the result we reach today in no way inequitably harms plaintiffs since as stated before, prior to the filing of this action they had filed a similar complaint in the Superior Court of Puerto Rico, Carolina Part, which is competent to hear such matter. Said court denied defendants' motion to stay proceedings and reasserted its jurisdiction over the subject matter and the parties involved. Moreover, co-defendant American International Insurance

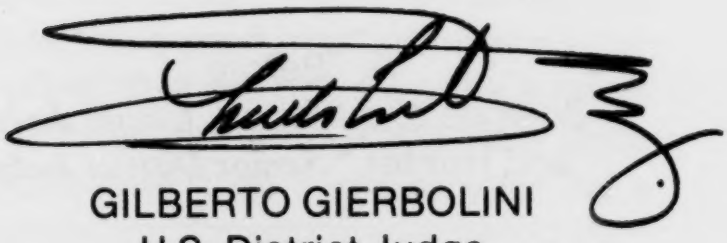
Co. of Puerto Rico, defendant Castañón's insurer, has consigned the sum of $100,000 in that court.

WHEREFORE, in view of the above, it is ordered that defendants' motion to dismiss plaintiffs' complaint for lack of subject matter jurisdiction be and is hereby granted, and consequently, the complaint herein is dismissed.

The clerk shall enter judgment accordingly.

SO ORDERED.

San Juan, Puerto Rico, this 15th. day of November, 1983.



GILBERTO GIERBOLINI
U.S. District Judge

United States Court of Appeals
FOR THE FIRST CIRCUIT

ABBOT BUDD KAUFER MEDINA, *et al*

Plaintiffs, Appellants

VS.

DAVID CASTAÑON PEREZ, *et al*

Defendants, Appellees.

CIVIL NO. 83-1900

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
***[Hon. Gilberto Gierbolini,* U.S. District Judge]**
[575 F. Supp. 168]

Before
Bownes and Aldrich, ***Circuit Judges,***
and Hunter,* ***Senior District Judge.***

Edelmiro Salas García for appellants.

Charles A. Cordero, with whom ***Cordero, Colón & Miranda*** was on brief, for appellee American International Insurance Company of Puerto Rico.

Agustín F. Fortuño for David Castañón Pérez, et. al.

May 2, 1984

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*Of the Western District of Missouri, sitting by designation.

ALDRICH, *Senior Circuit Judge.* Abbot Kaufer Medina and Luis Vélez Medina while swimming somme 120 feet off a public beach in Puerto Rico, were struck and injured by a small outboard-powered pleasure boat operated by defendant David Castañón Pérez. They, along with various family members, sued in the District Court, asserting admiralty jurisdiction. The court concluded that there was none, and dismissed the action. Plaintiffs appeal. We reverse.

Two relatively recent Supreme Court opinions are particularly relevant. In ***Executive Jet Aviation, Inc.*** v. ***City of Clevelant,*** 409 U.S. 249 (1972), a unanimous Court held that the location where the actual injury occurred did not determine the question of admiralty jurisdiction, a ruling that did not surprise a court which had learned the hard way that a dock could be "unseaworthy."[1] In ***Executive Jet*** a plane, allegedly improperly maneuvered over land, crashed into navigable waters. The Court, seeing no misconduct of a maritime nature, declined to hold that the locale of the injury conferred admiralty jurisdiction. There-

1. *Gutiérrez* v. *Waterman S.S. Corp.*, 373 U.S. 206 (1963), reversing *Waterman S.S. Corp.* v. *Gutiérrez,* 1 Cir., 1962, 301 F. 2d 415 (longshorema slipped on beans spilled on dock by reason of ship's unseaworthiness; known locally as the unseaworthy dock case.)

after, in ***Foremost Ins. Co.*** v. ***Richardson,*** 457 U.S. 668 (1982), the Court faced the question whether the maritime nature and locale of an accident resulted in admiralty jurisdiction when there was no commercial activity. Two small outboard-powered pleasure craft had collided on navigable waters. In an application of the "half-full-or-half-empty" approach, the majority ruled that, although there was no commercialism, half-full was enough, while the dissent considered the cup basically empty, regarding the Court as expanding traditional jurisdiction by eliminating a commercialism requirement.

The district court viewed one pleasure craft and a swimmer as a further refinement. In ruling against admiralty jurisdiction, it relied in part on a footnote in ***Executive Jet,*** more a factual recital than an expression of opinion, that it read as disapproving a case assuming jurisdiction over a suit by a water skier against the operator of his towboat. ***See Executive Jt,*** ante, 409 U.S. at 255-56 n.5 (citing ***King*** v. ***Testerman,*** 214 F. Supp. 335, 336 (E.D. Tenn. 1963)). Principally, however, the court relied on two Fourth Circuit decisions interpreting ***Executive Jet.*** These decisions, both of which preceded ***Foremost,*** held, on the one hand, that admiralty jurisdiction did not extend to a

suit by a water skier against his towboat operator, ***Crosson*** v. ***Vance,*** 4 Cir., 1973, 484 F. 2d 840, and, on the other, that it did extend to suits by pleasure-boat passengers injured when equipment on the boats they were aboard apparently malfunctioned, causing, in one case, an explosion, and, in the other, a collision with a river bank. ***Richards*** v. ***Blake Builders Supply, Inc.,*** 4 Cir, 1975, 528 F. 2d 745. Thus, the Fourth Circuit drew a distinction between persons injured on board a boat and those injured outside. The district court adopted this distinction, and, finding none further "between and accident involving a water skier struck by a boat and a swimmer so injured," held that it had no jurisdiction.

Even if this distinction were reasonable after ***Executive Jet,*** we do not believe it survived ***Foremost.*** The focus of ***Foremost*** was whether the wrong was related to "traditional maritime activity," and the Court made clear that the most fundamental of such activities is navigation of a vessel. The wrong alleged here was negligent navigation. There is no requierement that two vessels be involved in order to create admiralty jurisdiction. Nor is this an injured swimmer case such as those cited in ***Foremost,*** where the swimmer struck a submerged object, or another swimmer. ***Fore-***

most's citation to *Executive Jet,* for cases with "absolutely no connection to maritime activity," omitted mention of the water-skier case relied upon by the Fourth Circuit and the court below. *Foremost,* 457, U.S. at 674 n.4. We understand the district court's concern that the occurrence here may involve no significant federal interest, but this approach to the scope of admiralty jurisdiction was the view of the *Foremost* dissenters. The actor in this case was a vessel, and that is enough. Once given that defendant's boat is not excluded because non-commercial, it should make no difference that plaintiffs were in navigable waters rather than on them. We will leave to another day when an outboard goes out of control, runs ashore, and hits a sunbather. *But cf.* 46 U.S.C. § 740.

Reversed.

United States Court of Appeals
FOR THE FIRST CIRCUIT

ABBOT KAUFER MEDINA, *et al*

Plaintiffs, Appellants

VS.

DAVID CASTAÑON PEREZ, *et al*

Defendants, Appellees.

CIVIL NO. 83-1900

JUDGMENT
Entered: May 2, 1984

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgement of the District Court is reversed.

By the Court:
Francis P. Scigliano
Clerk

(cc: Messrs. Salas García, Fortuno and Cordero)

United States Court of Appeals
FOR THE FIRST CIRCUIT

ABBOT KAUFER MEDINA, *et al*

Plaintiffs, Appellants

vs.

DAVID CASTAÑON PEREZ, *et al*

Defendants, Appellees.

CIVIL NO. 83-1900

ORDER OF COURT
Entered: June 6, 1984

The judges of the Court who are in regular active service having voted against rehearing en banc,

It is ordered that said application for hearing en banc is hereby denied.

By the Court:

[cc: Messrs. Salas García, Cordero and Fortuno.]

Office-Supreme Court, U.S.
FILED
NOV 27 1984
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-318

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 1984 TERM

DAVID CASTAÑÓN PÉREZ, *et al.* and AMERICAN INTERNATIONAL INSURANCE COMPANY OF PUERTO RICO,

Petitioners-Appellants

v.

ABBOT BUDD KAUFER MEDINA, *et al.*,

Respondents-Appellees.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 1984 TERM

DAVID CASTAÑÓN PÉREZ, *et al.* and AMERICAN INTERNATIONAL INSURANCE COMPANY OF PUERTO RICO,

Petitioners-Appellants

v.

ABBOT BUDD KAUFER MEDINA, *et al.*,

Respondents-Appellees.

BRIEF OF RESPONDENTS IN OPPOSITION

This brief is submitted by respondents Abbot Kaufer Medina *et al.*, (Medina) in opposition to the petition of the American Insurance Company (American Insurance) and David Castañón Pérez (Pérez) for a writ of certiorari to the United States Court of Appeals for the First Circuit.

Statement of the Case

This action involves an attempt by the owner-operator of an 18-foot pleasure boat, the insurance company with coverage of the watercraft, and by the boat itself, principally to avoid punitive damages available only in Puerto Rico in admiralty, for the grossly reckless navigation of the boat by the owner, at high speed, on navigable waters of the Atlantic Ocean, which produced a collision with two persons in such waters, utterly chopping up one of them with the boat's propeller with ensuing extensive mutilation and permanent loss of one arm. The operator and the boat then fleeing the scene of

the accident without giving any aid to the helpless respondents who were left to drown claiming that such "navigation" or occurrence did not qualify within the term "traditional maritime activity," thus, that admiralty jurisdiction was lacking.

As recognized by the Court of Appeals for the First Circuit, this is a case for classic application of long established admiralty principles developed by this Court: a) a vessel in navigable waters is liable for injuries that it causes thereat through its navigation; b) the owner-operator of the vessel is likewise liable for the injuries that it causes in its reckless navigation of such vessel; c) the vessel's nature, coupled with such reckless conduct in navigable waters are all that is required to give rise to admiralty jurisdiction; d) the vessel's reckless navigation at high speed conducted in such manner in navigable waters of the Atlantic Ocean in an area where such owner-operator knows or should have known is also used by people swimming in such waters, makes both liable for the ensuing damages; e) and a marine insurance contract covering the operation of such watercraft confers likewise admiralty jurisdiction and is the reason for the insurance company's presence in this case; and f) there is no requirement that there be a *collision* between two boats to establish "traditional maritime activity" for admiralty jurisdiction.

To have failed to give effect to all these principles would have been repugnant to this Court's established legal precedent.

Facts

This action seeks recovery in admiralty against the boat itself (R28).* It also seeks to have the owner-operator Pérez assessed for the liability he incurred in

*Numbers in parentheses prefixed by the letter "R" refer to their docket number in the District Court.

ramming down two helpless persons in the water and after such collision, running away from the scene of such misdeed without giving any assistance to the persons left to drown.

The insurer covering the libeled boat's operation is co-petitioner American Insurance. Against the insurance company the respondents also seek damages in its bad faith litigation, having failed to honor its commitment to third-party beneficiary Medina, on its marine coverage for the actor boat. The said insurance company is still claiming lack of jurisdiction in admiralty, in this Court, after having delivered to the Superior Court of Puerto Rico what it claims is the face amount of the policy, the sum of $100,000. Such efforts on the part of American insurance are just directed to defeating the claim for punitive damages available only in the federal court's admiralty jurisdiction. Medina was maimed for life with the libeled boat on August 8, 1982. The deposit of $100,000 in the Superior Court of Puerto Rico was announced to the District Court on October 13, 1982, only after Perez had presented expert testimony, which brought his acquittal on "reasonable doubt" in the criminal action conducted by the government of Puerto Rico. Pérez's previous acquittal caused the Supreme Court of Puerto Rico to decide that his navigation of the libeled boat entailed the necessary intent for the crime of mayhem. *Pueblo v. Pérez*, _____ P.R.R. _____, 83 J.T.S. 81 (1983). That decision is annexed hereto as appendix of respondents.

After the announcement of American Insurance of the delivery of $100,000 to the Superior Court, the District Court below *sua sponte* reversed its previous denial of lack of jurisdiction and dismissed the case, 575 F. Supp. 168 (D.C.P.R.). It had previously denied the motion of Perez for dismissal on lack of jurisdiction back on April 25, 1983 (R14). Thus, on November 15, 1983, the District Court then dismissed this case for lack of jurisdiction

against the owner-operator of the boat, against the boat, and against the marine insurance company. It supported its decision on a pre-*Foremost* Circuit Court case, *Crosson v. Vance*, 484 F.2d 840 (4th Cir. 1973). It found that since only one boat was involved no admiralty jurisdiction existed, and stated:

> Had this been a case involving the collision of two boats we would have been compelled to apply *Foremost* and exercise jurisdiction . . . . We refuse to exercise jurisdiction over a tort involving an injured swimmer.

The First Circuit Court of Appeals found this case not to be one dealing with an injured swimmer but one dealing with the operation of a boat on navigable waters. It rejected the District Court's adherence to the dissenter's position in *Richardson v. Foremost Insurance Co.*, 457 U.S. 668 (1982) which was decided by this Court a scant 45 days prior to the running down of respondents with the boat libeled in this case.*

The Court of Appeals applied the decision of *Foremost, supra*, because here there was a boat involved and there existed no requirement that the vessel be commercial in order to establish admiralty jurisdiction. The Court of Appeals further stated that the libeled boat in

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*Lack of knowledge of *Foremost*, (it being thought at the time that pleasure craft were not encompassed under the admiralty jurisdiction of federal courts) brought about the filing by respondents of a civil case in the local court. When respondents learned of the *Foremost* decision, they promptly filed the instant admiralty action against the boat, the owner-operator, and the insurance company on the marine contract covering the operation of the watercraft because of the exclusive jurisdiction subject matter and because the actor boat operator-owner had been engaged in the most traditional maritime activity of all, navigation of a boat in the navigable waters of the Atlantic Ocean, however outrageous that navigation.

this case "was a vessel, and that is enough" and that there was claimed wrongful navigation of such vessel. The Court of Appeals rejected the District Court's requirement of *two* boats having to be involved and reiterated that the focus of *Foremost* was whether the wrong was related to "traditional maritime activity" and that this Court "had made clear that the most fundamental of such activities is navigation of a vessel."

Accordingly, the Court of Appeals reversed the dismissal of the action against the boat, the owner-operator and the insurance company on the marine contract.

A. The petition for a writ of certiorari should be denied because the United States Court of Appeals correctly applied the decisions of this Court.

Petitioners have failed to put forth a single cogent reason why a writ of certiorari should be issued. The two boats involved in *Foremost, supra*, were wholly lacking in any commercialism. Their nature was pleasure. The thrust of this decision, with such two small outboard-powered boats could not leave doubt in anyone's mind that there is no commercial requirement as a pre-requisite to admiralty jurisdiction. In the event that someone wished to doubt, this Court made sure no such misunderstanding could be claimed. The express ruling was:

> We also agree that there is no requirement that "the maritime activity be an exclusively commercial one."
>
> * * *
>
> The federal interest in protecting maritime commerce cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually *engaged* in commercial maritime activity. This interest can be fully indicated

> only if *all* operators of vessels on navigable waters are subject to uniform rules of conduct. (Emphasis of this Court).
>
> * * *
>
> Moreover, the smooth flow of maritime commerce is promoted when all vessel operators are subject to the same duties and liabilities.

An analysis of petitioners' theories shows that they must fail since the petition clearly characterizes the Circuit Court's decision as lacking admiralty jurisdiction solely because of there being swimmers in the navigable waters, when in fact the Circuit Court, relying on *Foremost*, properly concluded that admiralty jurisdiction existed since the negligent operation of a vessel on navigable waters was what had caused the injuries. In short, whether the status of the victim of the negligence be a swimmer, a fisherman or passenger on another vessel, is quite irrelevant as opposed to that of the actor. See: *Gemp v. United States*, 684 F.2d 404 (6th Cir. 1982) and *Clark v. Mobil Oil Corp.*, 693 F.2d 500 (5th Cir. 1982). In *Clark*, *id.*, there was not even a collision but the wake of the actor tugboat was the cause of the injuries.

Thus, this Court's declared uniformity of rules of conduct was rejected by the District Court below in its adoption of an additional requirement, that a *second boat* must be involved to establish admiralty jurisdiction. Petitioners' efforts to avoid punitive damages make them confuse subject matter jurisdiction with the personal status of the injured respondents, as though review should be made of their citizenship, a $10,000 minimum requirement, etc., or that they should pass some sort of eligibility requirement.

Petitioners' position is that only one boat's navigation is insufficient; if there are two boats, then there is

jurisdiction. Pursuant to such theory, a boat and its owner-operator in navigable waters would be outside the exclusive admiralty jurisdiction of a federal court unless the injured party, as a result of such navigation, is riding on another boat. This is erroneous because it should not be what participation in the collision plays the victim. Instead, the controlling fact should be that of the vessel and owner-operator that caused the injury for which the claim is brought in admiralty under the uniform duties and liabilities declared in *Foremost, supra*. In the case at bar the injuries were caused solely by *one* boat, and it was not necessary that the navigation of another vessel be disrupted or collided with. Jurisdiction in admiralty is the power to adjudge facts concerning the operation of a vessel in navigable waters which is a general question not dependent on a particular set of facts or on the personal status of the *injured* party, be it a person in the water, a fisherman on another boat, a passenger on the same vessel or the owner of a house boat. To put it another way, it is the power to hear and determine causes of the class in which the particular controversy belongs. We understand that to be precisely the main thrust of *Foremost, supra*, as the answer to the need for uniform rules governing navigation of vessels over the millions of boats in operation in the United States, including Puerto Rico. These rules are for navigation of vessels and not for swimmers and it is clear that the locality-plus requirements of *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972) are met in that here there is a watercraft involved instead of birds and an airplane, and that the most traditional maritime activity there is, is that of navigating in the Atlantic Ocean 120 feet from the shore.* Thus, the teachings of *Executive Jet*, and

*The area in which respondent Medina was swimming was at least 120 feet from shore. 575 F. Supp. at 169. Not only did pleasure craft, sail and power, frequent the area

(footnote continued on the following page)

Foremost have been fully followed and the decision of the Court of Appeals is correct in its analysis and application. Petitioners' contrary advancement of a rule of "significant relationship with maritime commerce" (Petition, p. 9) is misplaced as is the new proposed special "locality" requirement in such a theory when they state:

> We understand that there may be a significant relationship with maritime commerce when two boats collide at the mouth of a port, but not when a pleasure boat strikes a swimmer a few feet from the shore. (Petition, p. 9).

Thus, in addition to a *two* boat proposed requirement, petitioners also advance another requirement, that the collision take place not only in navigable waters but at the mouth of a port or similar place. Petitioners then contend that the Court of Appeals decision allows admiralty jurisdiction whenever a pleasure boat is involved. Not so. A reading of the decision of the Court of Appeals leaves no doubt that such jurisdiction in admiralty will be allowed only if there is a traditional maritime nexus, which the Court correctly found to be the *navigation of a vessel* and stated:

> The focus of *Foremost* was whether the wrong was related to "traditional maritime activity", and the Court made clear that the most fundamental of such activities is navigation of a vessel.

That there is no requirement of *two* boats is clear from this Court's statement in *Foremost:*

(footnote continued from the preceding page)
(which was not marked by buoys or otherwise restricted either for swimming or boating) but there is a shipyard nearby (App. p.14). In this case, after running over respondents, evidence showed that the operator of the boat first kept looking back on the scene of the damage and then sped away even faster in a different direction (App. p.15).

> Because the "wrong" here involves the negligent operation of *a vessel* on navigable waters, we believe that it has a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction in the District Court. (Emphasis added).

The Court of Appeals repeated almost *verbatim:*

> The wrong alleged here was negligent navigation.

The facts herein thus meet the necessary criteria for application of the *Foremost* principles as was held by the Circuit Court.

B. There are no conflicting decisions between the federal courts.

Contrary to petitioners' contentions (Petition at 12), there are no contradictory opinions existing to this day regarding pleasure boating collisions and federal admiralty jurisdiction. Prior to *Foremost,* there were such decisions but the Court of Appeals clearly addresses that fact by stating:

> These decisions, both of which preceded *Foremost,* . . . . (Petition 12a)

Indeed, the Court of Appeals went further. It said:

> Even if this distinction were reasonable after *Executive Jet,* we do not believe it survived *Foremost.* The focus of *Foremost* was whether the wrong was related to "traditional maritime activity," and the Court made clear that the most fundamental of such activities is navigation of a vessel. The wrong alleged here was negligent navigation.

As noted above, after *Foremost,* there are no inconsistent decisions cited by the petitioners contrary to the decision of the Court of Appeals. The pre-*Foremost*

decisions of *Crosson v. Vance*, 484 F.2d 840 (4th Cir., 1973) and *Richards v. Blake Builders Supply, Inc.*, 528 F.2d 745 (4th Cir., 1975) aside from being pre-*Foremost*, did not involve a libel against the vessel or against the marine insurance covering such vessel. Moreover, in *Gemp*, a post-*Foremost* case, there was only *one* pleasure boat involved and the Court expressly stated that admiralty jurisdiction existed under *Foremost*. Additionally, it should be noted that there has not occurred any congestion of the federal docket on account of the *Foremost* decision. To the contrary, there appears uniformity in the very few reported decisions.

C. There is no important federal question that has not been settled.

Petitioners contend that:

> Since *Executive Jet* criticized jurisdiction in injured swimmer cases, but *Foremost* spoke about the negligent operation of a vessel on navigable waters, courts everywhere have no clear guidance from this Court in deciding to grant or deny jurisdiction in an injured swimmer situation. (Petition, p. 19).

As noted above, in *Executive Jet*, *supra*, the locality-only rule was increased with the requirement that there be a traditional maritime nexus and there being only birds and an airplane involved in *Executive Jet*, it was found that there was no admiralty jurisdiction. Then the commercial requirement was eliminated in *Foremost*, *supra*, and now pleasure boats operating in navigable waters come under uniform rules of navigation. There is thus complete and clear guidance in all cases where there are boats navigating. The case at bar is not about two swimmers injured on a beach or by a submerged object or by another swimmer. It is about the reckless speeding of one boat that ran over two persons in

navigable waters, all of which under coverage of a contract of marine insurance which is the reason why petitioner American Insurance is in the case at bar. After the impact, the owner-operator and the libeled boat, which is a party *in rem* in this case (Petition, p. 23, 24), left respondents to drown and one of them, Medina, a pre-med student, lost an arm. Punitive damages are sought in the District Court, *Complaint of Merry Shipping, Inc.*, 650 F.2d 622 (1981), where such damages are available only in admiralty since Puerto Rico has no such remedy. *Carrasquillo v. Lippitt & Simonpietri, Inc.*, 98 P.R.R. 646 (1970).

It is also the position of respondents that a claim on a marine insurance policy falls within the admiralty jurisdiction of a federal court even if such coverage is provided under a policy entitled "Homeowner's." The injuries complained of resulted from callous disregard of rules of proper navigation, and there is no controversy in that the boat is covered by said policy. *Fleming v. Pan American Fire & Cas. Co.*, 495 F.2d 535 (5th Cir., 1974); *Ed & Fred, Inc. v. Puritan Mar. Ins. U. Corp.*, 506 F.2d 757 (5th Cir., 1975); *Stanley T. Scott & Co., Inc. v. Makah Development Corp.*, 496 F.2d 525 (9th Cir., 1974); *Owens-Illinois, Inc. v. United States Dist. Court*, 698 F.2d 967 (9th Cir. 1983); *American President Lines v. Green Transfer & Stor.*, 568 F. Supp. 58 (1983); *Insurance Co. of North America v. Virgilio*, 574 F.Supp. 48 (1983).

The most maritime object is a vessel. It is that vessel's reckless navigation which is the basis not only for the claims of the injured respondents but also for the admiralty jurisdiction of the federal court.

CONCLUSION

Petitioners are unable to demonstrate any inconsistency between the decisions of the Court of Appeals and any decision of a federal court after the *Foremost* decision. As a result, review by this Court is unnecessary, and the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit should be denied.

Dated: November 26, 1984

Respectfully submitted,

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(Translation)

IN THE SUPREME COURT OF PUERTO RICO

The People of Puerto Rico,

Plaintiff and petitioner

v.

David Castañón Pérez,

Defendant and respondent

No. 0-82-793
Certiorari

MR. JUSTICE DIAZ CRUZ delivered the opinion of the Court.

San Juan, Puerto Rico, June 30, 1983

The Government seeks review, by way of certiorari, from a peremptory acquittal decreed by the trial court in a mayhem charge, which acquittal was grounded on findings of fact that, insofar as pertinent[1] for our decision, state:

> On Sunday, August 8, 1982, between four thirty and five o'clock in the afternoon, the young man Abbot Kaufer Medina, together with his cousin Luis Rafael Vélez Medina and his friend Sergio Cima de Villa, were enjoying a day at the beach.

[1] We have only omitted one paragraph and part of another (15 lines).

They were in the water, about 120 to 125 feet from the shore. By shore here is meant the water's edge. It was a sunny day, the sea was calm and normal in the beach sector of Isla Verde, jurisdiction of Carolina, known to water sports lovers as "Los Hobbie," because there is a hobbie cat shipyard nearby, between the Villas del Mar and Girasol Condominiums. A short while after they had gone into the water, and while they were chatting at about ten (10) feet from one another, Sergio Cima de Villa, looking east and his friends Abbot and Luis facing him with their backs to the east, saw a speeding motor boat approaching them; the boat travelled from east to west about thirty (30) or forty (40) feet away. He called out to Luis, "careful, a motor boat is coming," Luis looked back, and immediately dived. The boat went between him and his friends Abbot and Luis, who were at the above-mentioned distance from him.

That he heard the noise of something that was hit, that the motor boat passed at about six (6) feet from him, that he did not have the time to swim. He did not dive, or suffer any impact of injury from the motor boat. That, after this incident, he asked his friend Luis if he was all right and he answered yes, he asked Abbot, are you okay? Is anything wrong with you? Abbot did not reply. When they saw that Abbot did not answer, they swam towards him, and noticed that there was blood around Abbot's body, that his body was sinking.

That with the help of Luis Rafael Vélez Medina and other swimmers that went to the scene, they got Abbot to the

shore and, once on the sand, he realized that Abbot's left arm was missing, and that he was injured on the left side of the body, and was bleeding profusely. Abbot was taken to a hospital in a taxi they hailed.

That there were many people on the beach and in the water, although he did not mention a specific place; he merely indicated that the group of swimmers nearest to them was at about twenty-five (25) feet. (Regarding this point, that is, the group of swimmers, another witness, Luis Rafael Medina, said the swimmers were at about forty feet from them.)

According to the evidence for the prosecution, witness Luis Rafael Vélez Medina, who could not identify the defendant as the pilot of the motor boat that afternoon of August 8, 1982, reckons that the motor boat was traveling at a speed of fifty (50) to fifty-five (55) miles per hour, comparing it to an automobile. That after the motor boat hit them, it did not stop to help them; that it kept its course towards San Juan, making a left turn and heading eastward, that is to say, towards Boca de Cangrejos. According to the evidence for the prosecution, the depth of the water at the scene of the accident was six (6) feet or a little over six (6) feet. Evidence was also brought in the sense that, while moving away from the scene of the accident, the pilot of the motor boat kept looking back, that there was nobody else with him, that when he stopped looking back, he put on speed heading towards Boca de Cangrejos, where later on the motorboat was found. It was described as a gray 18 to 20-foot Glastron motor

boat; the defendant was spraying the back (stern) of the boat with a hose. The boat was already out of the water, ...

Orestes Pavía and Sergio Cima de Villa, witnesses for the prosecution, identified the defendant David Castañón Perez, in open court as the boat pilot at the time of the accident, who did not stop to assist the injured or to furnish his personal information to the affected party or parties.

Likewise, the prosecution brought evidence to the effect that the defendant also failed to notify the accident to the Ports Authority, as was his duty under the Law (stipulated testimony of Mr. Ricardo Correa Marcano, an officer of the Ports Authority).

The offense of mayhem is defined thus in art. 96 of the 1974 Penal Code, 33 L.P.R.A. § 4033:

Every person who unlawfully and maliciously deprives another of a member of his body, or maims, disfigures or renders him useless, or cuts or mutilates the tongue, or puts out an eye, or slits the nose, ear or lip, disfigures or permanently changes the appearance of his face, or permanently impairs his capacity to hear, see or speak, shall be punished by imprisonment for a fixed term of nine (9) years. Should there be aggravating circumstances, the fixed penalty established may be increased to a maximum of fifteen (15) years; if there should be extenuating circumstances, it

> may be reduced to a minimum of six (6) years. The Court may impose the penalty of restitution in addition to the penalty of imprisonment established, or both penalties.

The definition of the terms "malice" and "maliciously" given in art. 7(19) of the Penal Code, 33 L.P.R.A. § 3022(19), stating that they "denote the commission of a damaging, intentional act, without justification or excuse and the conscious nature thereof," must be read and understood under the culpability standards laid down in art. 14, which provides:

> No person may be penalized for an act or omission regarded to be a crime pursuant to law unless the same is done with intent or criminal negligence.
>
> The intent or negligence are shown by the circumstances connected with the crime, the mental capacity and the expressions and conduct of the person. 33 L.P.R.A. § 3061.

The new provision introduces the classification of the offense as either intentional or willful; and negligent or culpable, equivalent to reckless negligence. Absence

of malice constitutes the main key to characterize negligence. Our Code then proceeds to distinguish between intent and negligence, and states:

> Art. 15. Intent
>
> Crime is intentional:
>
> (a) When the result has been foreseen and wanted by the person as a consequence of his act or omission; or
>
> (b) When the result, though unwanted, has been foreseen or could have been foreseen by the person as a natural or probable consequence of his act or omission. 33 L.P.R.A. § 3062.
>
> Art. 16. Negligence
>
> The person who brings about an unwanted criminal result through negligence or carelessness, or lack of circumspection or skill or through nonobservance of the law, is responsible for negligence. 33 L.P.R.A. § 3063.

The fact that intent and means have not been qualified in mayhem--as in murder (arts. 82 and 83 of the Penal Code)--does not allow for the requirement of specific intent. Many years ago, and without the help of such an explicit means as that pro-

vided by the modern Penal Code, this Court reached the same conclusion when it held that "it is not necessary under the code to prove a specific intention in order that mayhem may be held to have been committed, inasmuch as every person must answer for the natural consequences of his willful and malicious acts, it is not necessary that the information alleges such intention to commit mayhem." And at the end, the opinion anticipated the above-mentioned forms of intent and negligence, and we stated: "what the fiscal must prove in cases of this kind (a wound that severed four fingers) is that the accused deprived another person of a member of his body." People v. Pizarro, 21 P.R.R. 17, 20, 22 (1914).[2]

[2]The text thus construed in 1914, was art. 212 of the 1902 Penal Code, which, insofar as its introductory part is concerned: "Every person who unlawfully and maliciously deprives a human being of a member of his body. . .," coincides with the present art. 96.

The acknowledgment of extenuating circumstances--known as causes excluding liability--complements the concept of criminal liability in the Code. Fortuitous event, which is the first one on the list and which is the only one that may be related (although not applied) to the case at bar, is identified thus in art. 18 of the Code: "A person who, upon executing a lawful act, with due diligence, or upon committing an omission, causes injury by mere accident, misfortune, or fortuitous event, without intention or negligence, shall not be held liable."

On January 20, 1983, we ordered the defendant-respondent to show cause[3] why we should not accept, as prima facie evidence of the offense of mayhem, under the rules of intent and negligence of arts. 15 and 16 of the Penal Code, the evidence presented up to this moment at the trial and on which evidence the trial court granted a peremptory acquittal. Confronted with the precise

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[3]The order reads thus:

"Bearing in mind that the evidence brought up to this moment to the trial by The People of Puerto Rico establishes that the defendent incurred negligence that (a) brought about an unwanted criminal result through carelessness, or lack of circumspection or skill, or through nonobservance of the law (art. 16 Penal Code, 33 L.P.R.A. § 3063; 23 L.P.R.A. § 451h(a)); or (b)committed a criminal act in circumstances where the result, though unwanted, has been foreseen or could have been foreseen by him as a natural or probable consequence of his act or omission (art. 15, Penal Code, 33 L.P.R.A. § 3062); and that the offense of mayhem does not require more intent than the manifested by the aforesaid conduct, the respondent shall have until February 4, 1983, to show cause why we should not find prima facie evidence of mayhem, set aside the nonsuit resolution, and remand the case for further trial."

and all-embracing text of said criminal provisions, the defendant-respondent could only offer a solution that falls within the realm of the Legislative Assembly: that the offense of mayhem be limited, insofar as intent is concerned, to assault or intent to assault and to cause injury, and that malice be presumed only if the damage was a consequence of an act dangerous per se. The proposition is so ambitious that it calls for the modification of the basic liability principle that characterizes the Code as an instrument of social protection in the modern times, times of high industrial development; it limits such concepts as intended and negligent crime, and shuns in the offense of mayhem, the essential purpose of punishing atrocity,[4] disregarding the means

[4]The offense of mayhem was originally considered an atrocious breach of the king's peace, an offense tending to deprive him of the aid and assistance of his subjects rendering them less able in fighting either to defend themselves, or annoy their adversaries. State v. Bass, 255 N.C. 42 (1961); 86 A.L.R.

or the instrument used for its commission. Regarding the criminal negligence or culpable act set up in art. 16 based on a person's bringing about an unwanted criminal result through negligence, carelessness, lack of circumspection or skill, or nonobservance of the law, the need of making it punishable only when required by ulterior specification of the Code or by a special law, was rejected after extensive debate.[5] The modern

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2d 259. Nowadays what is protected is the integrity of the person, the natural sufficiency and good appearance of the limbs and organs of the human body, and the preservation of its functions.

[5]Comments to art. 16 in the Justice Department edition, 36 Rev. Col. Abo. 22, No. 1 (February 1975), that presents the statement of criminalist López Rey & Arrojo, which reads: "the general tendency is to recognize a greater criminal liability for facts arising from negligence, lack of skill or nonobservance of the duties, based on the complexities of the modern world evinced in the evergrowing mechanization, industrialization, fabrication and prefabrication, mass production, growing technology and a need for greater expertise, all of which means that a greater attention and care should be paid to the community. There were no such demands and circumstances in the mid-nineteenth century."

structure of our Criminal Law, elaborated over the principle that the person who commits a criminal act is liable for all the damages arising therefrom,[6] establishes that the absence of a perfect balance between the criminal intent and the result in no way excludes the criminal liability of the agent who will be reached both by the liability derived from the act committed and the liability for the consequences arising therefrom.

Article 15(b) of the Code establishes that the crime is intentional when the result, although unwanted, was foreseen or could have been foreseen by the person as a natural or probable consequence of his act or omission. The conjugation of intent and consequence restricts the connotation of malice that, within the meaning of the term in art. 7(19) of the Code, does not

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[6] Cf. Pueblo v. Calderón Laureano, 82 J.T.S. 156.

go beyond a damaging, intentional act, without justification or excuse, the awareness of whose nature is present in the person who commits it. Conclusion which we had already reached in People v. Pizarro, supra, where we deemed that the information did not have to allege "intent to commit mayhem." In California,[7] from where our original article was taken, the term "maliciously" in the definition of mayhem does not imply determination and premeditation, and it is sufficient to prove only the commission of an act from which the law will presume that it was done unlawfully and maliciously, unless the evidence tends to show an extenuating circumstance. People v. Nunes, 190 P. 486 (1920); 47 C.A. 346, 349. The only intent required is that which could be inferred from the injuries resulting from

[7]The California Code defines mayhem thus: "Every person who unlawfully and maliciously deprives a human being of a member of his body. . . ." Sec. 203, West's Annotated California Codes, Penal, Secs. 1-210.

certain intentional acts. Goodman v. Superior Court of Alameda County, 148 Cal. Rptr. 799 (1978); 84 Cal. App. 3d 621. Based on the premise that the intentional unlawful conduct comprises malice, the Supreme Court of North Carolina affirmed a sentence for mayhem imposed on a physician who, in the absence of the actual offender, deadened the fingers whose severance the victim had arranged with a third person in order to collect insurance money. State v. Bass, 120 S.E.2d 580 (1961), n. 4, ante.

Deliberate malice is not an essential element of the offense of mayhem, hence proof of premeditation or deliberation is not necessary. People v. Wright, 93 Cal. 564, 566 (1892). In People v. Cordero, 82 P.R.R. 367, 370 (1961), we approvingly cited People v. Wright and People v. Pizarro, supra, in the sense that the offense of mayhem does not require proof of specific intent or premeditation because, "in any

event, said malice may be inferred from the conduct of the accused or the circumstances attending commission of the offense . . . ., since malice is, for this purpose, a synonym of the purpose or design to injure . . . . (M)alice shall be established by proof of the commission of the act. . . . One of the aims of the lawmaker in defining this offense was to avoid astounding brutality . . . and hence that malice could be presumed from the atrocity of the act itself and which, among other cases, is inferred from the nature of the instrument or means used for the assault." The United States Supreme Court probed into this field of liability that includes purpose, knowledge, inprudence, and negligence, and concluded that, insofar as the administration of the federal system of criminal justice is confided to ordinary mortals, whether they be lawyers, judges, or jurors, the system could easily fall of its own weight if courts or scholars became

obsessed with hair-splitting distinctions, either traditional or novel, that Congress (please read Legislature) neither stated nor implied when it made the conduct criminal. United States v. Bailey, 444 U.S. 394, 406 (1980). Cuello Calón also opines that the words "maliciously," "knowingly" and "purposely," and others that denote the willfulness of the agent, constitute "completely superfluous redundancies" and that said expressions have been used to denote a merely intentional act (with that common or ordinary intent). I-1 Derecho Penal 430 (16th ed. 1971).

The evidence for the prosecution in the case at bar shows that the respondent was piloting a motorboat at high speed on a crowded beach, in a shallow (six-feet deep) bathing area. After the impact of the motorboat and swimmer that severed Kaufer Medina's left arm, the prima facie concept of the intentional offense of mayhem defined in

art. 15(b) of the Penal Code comes forth:

a result that, although unwanted, could have been foreseen by the respondent pilot as a natural consequence of his act. The foreseeability of causing serious injury to the swimmer, induced by the awareness of the risk entailed by traveling at 50 mph in a 6 feet deep area crowded with people, should also be in our milieu a constant concern of motorboat sportsmen in view of the frequent public protests made by swimmers against the incursion of boaters into shallow bathing areas. The form in which the respondent was piloting his motorboat, and the place as per the trier's findings, not only constituted a ground to establish the foreseeability of the catastrophic accident, but also a highly dangerous and notorious conduct, strongly condemned in our public beaches. The rule laid down in People v. Astacio, 23 P.R.R. 783 (1916), that required a cyclist who was speeding through

the streets of Cabo Rojo to foresee that he could run over somebody as he actually ran over a girl--and was convicted for assault and battery--is more effective today, more than half century later. The defendant-respondent, who was not riding his bicycle through the usually deserted small-town street, but who was speeding in his motorboat amid the heads and torsos of bathers clustered in a crowded beach, creates a dangerous situation and "cannot be heard to deny that he intended to cause bodily injury to any of them, although he may not have intended to injure a particular person." Astacio, supra at 786. "The duty to pay attention and to exercise due diligence . . . demandable from all persons in the course of daily life seems to be more urgent as time goes by, due to modern life conditions where man has access to a tremendous array of mechanical forces whose imprudent or negligent operation could

cause very serious wrongs, thus the violation of said duty calls for strong sanction." Cuello Calón, op. cit. at 448.

We appreciate the intellectual honesty of the trial judge who was led to an erroneous conclusion in this sad case, which he worked without the benefit of the construction offered today by this Court on a question that has required an in-depth examination for which we know he had no time or means within the constant pressure of the criminal calendar.

In view of the foregoing, the writ is issued, the peremptory acquittal from the charge of mayhem is set aside, and the case shall be remanded for further proceedings consistent with our result herein.

(Translation)

IN THE SUPREME COURT OF PUERTO RICO

The People of Puerto Rico,

Plaintiff and petitioner

v.

David Castañón Pérez,

Defendant and respondent

No. 0-82-793
Certiorari

Separate vote of MR. JUSTICE DAVILA.

San Juan, Puerto Rico, June 30, 1983

I have joined the opinion of the Court, but I think it necessary to state that, even under respondent's theory that "the offense of mayhem be limited insofar as intent is concerned, to assault or intent to assault and to cause injury, and that malice be presumed only if the damage was a consequence of an act dangerous per se," if the facts charged are proved, he would be guilty of mayhem because the injury was "a consequence of an act dangerous per se": to drive an outboard motorboat at high

speed near the seashore where a group of people were enjoying a swim. Cf. People v. Astacio, 23 P.R.R. 783 (1916).

(Translation)

IN THE SUPREME COURT OF PUERTO RICO

The People of Puerto Rico,

Plaintiff and petitioner

v.

David Castañón Pérez,

Defendant and respondent

No. 0-82-793
Certiorari

Separate vote of MR. JUSTICE IRIZARRY YUNQUE:

San Juan, Puerto Rico, June 30, 1983

I concur with and join my vote to the opinion of the Court because I find that its appreciation of the Law is correct and because of the fact that it is limited to recognizing that, in this case, the evidence brought, vis-à-viz a motion for peremptory acquittal under Rule 135 of the Rules of Criminal Procedure, is sufficient to establish a prima facie case against the defendant. The opinion does not pass on, nor could it pass on, aspects of credi-

bility or on the sufficiency of the evidence with regard to the constitutional requirement of establishing guilt beyond a reasonable doubt. This is up to the trier of facts.

The Penal Code in force is a well-harmonized system, which was adopted in 1974 to take the place of the obsolete Code of 1902, and to correct many of the latter's flaws. See the report on the Senate Bill No. 753 which became the act that adopted the present Penal Code. 33 L.P.R.A. § 3001 (annotation).

Under this legislative scheme it is impossible to conceive that the "gross or willful negligence" defined in art. 87 (33 L.P.R.A. § 4006) is equivalent to the malice required by the offense of mayhem as defined in art. 96 (33 L.P.R.A. § 4033). I shall explain further.

Article 87 provides:

When, in a death caused by a person while driving a motor vehicle, there is proof of gross or wilful negligence, he shall be punished by imprisonment for a fixed term of three (3) years. Should there be aggragavating circumstances, the fixed term established may be increased to a maximum of five (5) years; if there should be extenuating circumstances, it may be reduced to a minimum of two (2) years.

Gross or wilful negligence is that which by its nature shows absolute contempt for the safety of others under circumstances which will probably cause harm to the latter, and does not merely involve carelessness.

Article 96 reads:

Every person who unlawfully and maliciously deprives another of a member of his body, or mains, disfigures or renders him useless, or cuts or mutilates the tongue, or puts out an eye, or slits the nose, ear or lip, disfigures, or permanently changes the appearance of his face, or permanently impairs his capacity to hear, see or speak, shall be punished by imprisonment for a fixed term of nine (9) years. Should there be aggravating circumstances, the fixed penalty established may be increased to a maximum of fifteen (15) years; if there should be extenuating circumstances it may be reduced to a minimum of six (6) years. The Court may impose the penalty of restitution in addition to the penalty of imprisonment established, or both penalties.

As a reading of these articles shows, causing a person's death when driving a motor vehicle with "gross or willful negligence," and "unlawfully and maliciously" depriving a person of a member of his body, are both felonies, but the Lawmaker deemed that the second offense was most serious than the first one because, whereas a three-year sentence is set for the former, the punishment for the latter is three times longer--nine years in prison. In abstract terms, nobody would think that, from the point of view of the Code, to deprive a person of a member of his body would be a more serious offense than to deprive a person of his life. The right to life is one of the fundamental rights of our Constitution. Bill of Rights, Art. II, Sec. 7.

The only explanation to justify the different punishments established for these offenses can be found in the way they are committed. Manslaughter, as defined in

art. 87, requires "gross or willful negligence." Mayhem requires that the defendant acts "unlawfully and maliciously." Obviously, "gross or willful negligence" and "malice" are not synonyms. Hence, a person who "unlawfully and maliciously" hurls a a motor vehicle against a group of persons and with his act, causes the death of said persons, commits the offense of murder as defined in art. 82 (33 L.P.R.A. § 4001).* If with his act he deprives one of the persons of a member of his body, he commits mayhem.**

The defendant in the case before our consideration, is charged with "illegally, voluntarily, maliciously, and criminally depriving the human being Abbot Kaufer

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*It reads: "Murder is the killing of of a human being with malice aforethought."

**The terms "malice or maliciously" are defined in art. 7 of the Code, 33 L.P.R.A. § 3022(19), as "denot(ing) the commission of a damaging, intentional act, without justification or excuse and the conscious nature thereof."

Medina of a member of his body, when, while said defendant was operating a motorboat in the Isla Verde beach, he impacted said young man with his motorboat and severed his left arm with the propeller." After the close of the evidence for the prosecution which tried to establish the allegations in the information, the defendant sought, and the court granted him, a peremptory acquittal under Rule 135 of the Rules of Criminal Procedure.

The cited Rule 135 provides that the court "on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses of the information or complaint at any time after the evidence of either side is closed if the court deems the evidence insufficient to warrant a conviction of such offense or offenses."

In the case before us, only evidence for the prosecution has been presented.

Its sufficiency should be determined in such a way that, if considered as a whole, bearing in mind the inferences it allows, and also considering it as is most favorable to the information, if it is true, it would duly establish all the essential elements of the offense charged. On this particular, see, Wright, Federal Practice and Procedure: Criminal 2d § 462 and § 467, where it cites abundant case law regarding Rule 29 of the Federal Rules of Criminal Procedure, which is similar to our Rule 135. The following comment on sec. 467 is relevant hereto:

> A number of familiar rules circumscribe the court in determining whether the evidence is sufficient to meet this test. It is not for the court to assess the credibility of witnesses, weight the evidence, or draw inferences of fact from the evidence. These are functions of the jury. The court must look to all of the evidence, but must take the view of the evidence and the inferences therefrom most favorable to the government. That the testimony is in conflict is not in itself enough to require judgment of acquittal. (Footnotes omitted.)

The evidence adduced herein is contained in the opinion of the Court, thus we need not copy it again. It points to the defendant as the pilot of the motorboat traveling at a high speed over shallow waters near the beach that was crowded with swimmers, and who, with the propeller of his motorboat, tore off an arm from one of the swimmers, after which he left the place at great speed.

The intent to commit a wrongful act, without justification or excuse and the conscious nature thereof, are subjective factors expressly required by the Penal Code to constitute the element of "malice or maliciously." Art. 7(19), ante. Since these are subjective factors, they must be inferred from the circumstances as a whole. In view of a motion for peremptory acquittal, as that proposed herein, these circumstances should have been considered as were most favorable to the information, and that

is why, in this case, said motion should not have been granted.

Notwithstanding the aforesaid, it bears noting that to pass on the sufficiency of evidence when examining a motion under Rule 135, is one thing, and to weigh the totality of the evidence after both parties have presented their cases, so that the Court may pass on the defendant's innocence or guilt, is quite another. In the second case, the approach is different. To find the defendant guilty, the evidence must satisfy the trier's mind beyond a reasonable doubt. We cannot pass upon that, because it is within the exclusive province of the trier of facts.

I agree that the case be remanded to the trial court for further proceedings.